IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CHARLES C. HASBROUCK, Plaintiff, vs. YOUTH SERVICES INTERNATIONAL, INC., Defendant.	No. C01-3050-MWB **MEMORANDUM OPINION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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This matter is before the court on the motion for summary judgment filed by the defendant Youth Services International, Inc. ("YSI"). The plaintiff Charles C. Hasbrouck ("Hasbrouck") filed this lawsuit on May 11, 2001,[1] alleging YSI discriminated against him in violation of the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq*. (the "ADA"), by precluding him from returning to his job as a youth counselor after he suffered a back injury in an automobile accident. In its motion, YSI argues Hasbrouck is not disabled for purposes of the ADA; he is not a qualified individual with a disability because he is unable to perform the essential functions of the youth counselor position, with or without reasonable accommodation; and in any event, Hasbrouck failed to seek reasonable accommodation from YSI.

Hasbrouck resists YSI's motion, claiming he is disabled and he can perform the essential functions of the youth counselor position.

This case is scheduled for trial on November 18, 2002. Hasbrouck is represented by Michael J. Carroll of Coppola, Sandre, McConville & Carroll, P.C. of West Des Moines, Iowa. YSI is represented by Kelly R. Baier of Bradley & Riley, P.C. of Cedar Rapids, Iowa.

The court has reviewed the parties' statements of fact, briefs, and appendices, and finding this matter to be ready for decision, turns to consideration of YSI's motion.

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[1]Hasbrouck actually filed two lawsuits on the same date, one against "Youth Services International of Norther" and one against "Youth Services of Northern Iowa, Inc., Forest Ridge." The complaints in the two cases were identical, and the court ordered the two cases consolidated. (Doc. No. 8)

I. FACTUAL BACKGROUND

The following facts are either undisputed, or are viewed in the light most favorable to Hasbrouck as the non-moving party. YSI operates a youth care detention facility in Estherville, Iowa, called Forest Ridge Academy ("Forest Ridge"). Hasbrouck was hired on August 9, 1993, to work as a youth counselor at Forest Ridge. In February 1995, while he was still employed as a youth counselor, Hasbrouck injured his back in a motor vehicle accident. He continued to work until his condition worsened to the point that surgery was necessary. Hasbrouck applied for and received short-term disability leave in September 1997, and then applied for and received long-term disability leave in December 1997. At the time he received both the short-term and the long-term disability leave, Hasbrouck was unable to perform the duties of his job as a youth counselor.

Before he left on disability leave, Hasbrouck had several discussions with Greg Bromley, a team leader who supervised Hasbrouck for part of his tenure at Forest Ridge, regarding whether Hasbrouck would be allowed to return to work. Bromley consistently told Hasbrouck he could only return to work as a youth counselor when he was 100% healthy.

The essential functions of the youth counselor position at Forest Ridge include, among other things, maintaining the security of the facility and "crisis intervention." As part of the crisis intervention function, youth counselors are required to physically restrain students at least once or twice per month, using procedures that are designed to protect both the staff and the students. This crisis intervention usually is conducted by three to four youth counselors, but always at least two counselors, acting together. Restraining students of different sizes and weights sometimes requires twisting, turning and kneeling. At the time he applied for long-term disability leave, Hasbrouck's physical restrictions included not lifting more than 40 pounds, and no bending or twisting.

As of June 10, 1999, Hasbrouck's physician continued to indicate Hasbrouck was not recovered to the point where he could restrain the patients at Forest Ridge. Hasbrouck's

permanent restrictions, as of January 2000, were no lifting over 40 pounds and no repetitive bending or twisting.

Hasbrouck's disability benefits were discontinued on December 30, 1999. Hasbrouck continued to converse with Bromley about whether he could return to work, and asked if he could perform some other job such as driving the bus.[2] Bromley reiterated that Hasbrouck could not return to work until he was 100% healthy.

At least two weeks before Hasbrouck's long-term disability benefits were discontinued, Forest Ridge began advertising for a part-time Staffing Coordinator/ Recruiter. The job posting specified that "[a] Bachelors degree and/or two to three years equivalent work experience with a Human Resources setting [are] preferred." Hasbrouck has an associate's degree. Although Hasbrouck did not submit a formal application for the position, he did repeatedly express interest in returning to work in some capacity. The person hired for the Staffing Coordinator/Recruiter position has a bachelor's degree in social work and had been working at Forest Ridge since 1997.

Hasbrouck's overall work performance during his tenure at Forest Ridge was satisfactory. However, given Hasbrouck's physical restrictions, Bromley did not believe Hasbrouck could perform the essential functions of the youth counselor position. Hasbrouck ultimately was informed that he would never be employed by Forest Ridge again because he was not 100% healthy.[3]

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[2]Hasbrouck had a bus driver's license and had driven the bus in the past.

[3]This court has held previously that a "100% healed" policy is a *per se* violation of the ADA because it fails to make an individualized assessment of a person's "ability to perform the essential functions of the person's job with or without accommodation following injury and resulting permanent disability, but substitutes for this inquiry simply a determination of whether the person is '100% healed' from the injury." *Hutchinson v. United Parcel Service*, 883 F. Supp. 379, 396-97 (N.D. Iowa 1995). However, as was the (continued…)

Hasbrouck filed a discrimination claim against Forest Ridge with the Iowa Civil Rights Commission ("ICRC"), and cross-filed with the Equal Employment Opportunity Commission ("EEOC"). The ICRC denied relief, and the EEOC adopted the ICRC's findings and administratively closed its file, issuing a right-to-sue letter to Hasbrouck on February 12, 2001. Hasbrouck timely filed this action on May 11, 2001.

II. LEGAL ANALYSIS

A. Standards for Summary Judgment

On several prior occasions, this court has considered in some detail the standards applicable to motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See, e.g.*, *Swanson v. Van Otterloo*, 993 F. Supp. 1224, 1230-31 (N.D. Iowa 1998); *Dirks v. J.C. Robinson Seed Co.*, 980 F. Supp. 1303, 1305-07 (N.D. Iowa 1997); *Laird v. Stilwill*, 969 F. Supp. 1167, 1172-74 (N.D. Iowa 1997). The essentials of these standards for present purposes are as follows.

1. Requirements of Rule 56

Rule 56 provides, in pertinent part, that "[a] party against whom a claim . . . is asserted . . . may, at any time, move for summary judgment in the party's favor as to all or any part thereof." Fed. R. Civ. P. 56(b). Further,

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[3](…continued)
case in *Hutchinson*, Hasbrouck would lack standing to raise such a claim here because, as explained in this opinion, he "is not a person with a disability within the meaning of the ADA; therefore, [he] is not a person who can assert a claim under 42 U.S.C. § 12112(a), nor one who can be wronged by violation of its provisions. Furthermore, there is no real or immediate threat that [Hasbrouck] will become such a person, and therefore [he] cannot generate standing." *Hutchinson*, 883 F. Supp. at 398. Hasbrouck has not asked the court to reconsider its holding in *Hutchinson* regarding who has standing to raise this issue, and the court declines to do so *sua sponte*.

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law*.

Fed. R. Civ. P. 56(c) (emphasis added).

Applying these standards, the trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990). An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)); *accord Lockhart v. Cedar Rapids Comm. Sch. Dist.*, 963 F. Supp. 805, 814 n.3 (N.D. Iowa 1997) (citing *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1355-56). As to whether a factual dispute is "material," the Supreme Court has explained, "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986); *accord Rouse v. Benson*, 193 F.3d 936, 939 (8th Cir. 1999).

2. The parties' burdens

Procedurally, the moving party bears the initial responsibility of informing the court of the basis for its motion and identifying the portions of the record showing a "lack of a genuine issue." *Hartnagel*, 953 F.2d at 395 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986)); *see also Rose-Maston v. NME Hospitals, Inc.*, 133 F.3d 1104, 1107 (8th Cir. 1998). When this burden is met, the party

opposing summary judgment "must do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586, 106 S. Ct. at 1356. Instead, the opposing party is required to go beyond the pleadings, and by either affidavits or the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553; *Rabushka ex. rel. United States v. Crane Co.*, 122 F.3d 559, 562 (8th Cir. 1997). If the opposing party fails to make a sufficient showing of an essential element of a claim for which that party has the burden of proof, then the movant is "entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2552; *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 113 F.3d 1484, 1492 (8th Cir. 1997). In considering a motion for summary judgment, the court must viewing all the facts in the light most favorable to the nonmoving party and giving that party the benefit of all reasonable inferences that can be drawn from the facts. *Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356; *Quick*, 90 F.3d at 1377.

3. Summary judgment in employment discrimination cases

Because this is an employment discrimination case, it is well to remember the Eighth Circuit Court of Appeals has cautioned that "summary judgment should seldom be used in employment-discrimination cases." *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (citing *Johnson v. Minnesota Historical Soc'y*, 931 F.2d 1239, 1244 (8th Cir. 1991); *Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 364 (8th Cir. 1987)); *see also Snow v. Ridgeview Medical Ctr.*, 128 F.3d 1201, 1205 (8th Cir. 1997) (citing *Crawford*); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 615 (8th Cir. 1997) (quoting *Crawford*); *Chock v. Northwest Airlines, Inc.*, 113 F.3d 861, 862 (8th Cir. 1997) ("We must also keep in mind, as our court has previously cautioned, that summary judgment should be used sparingly in employment discrimination cases," citing *Crawford*); *Smith v. St. Louis Univ.*, 109 F.3d

1261, 1264 (8th Cir. 1997) (quoting *Crawford*); *Hardin v. Hussmann Corp.*, 45 F.3d 262, 264 (8th Cir. 1995) ("[S]ummary judgments should only be used sparingly in employment discrimination cases[,]" citing *Haglof v. Northwest Rehabilitation, Inc.*, 910 F.2d 492, 495 (8th Cir. 1990)); and *Hillebrand*, 827 F.2d at 364.

Summary judgment is appropriate in employment discrimination cases only in "those rare instances where there is no dispute of fact and where there exists only one conclusion." *Johnson*, 931 F.2d at 1244; *see also Webb v. St. Louis Post-Dispatch*, 51 F.3d 147, 148 (8th Cir. 1995) (quoting *Johnson*, 931 F.2d at 1244); *Crawford*, 37 F.3d at 1341 (quoting *Johnson*, 931 F.2d at 1244). To put it another way, "[b]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant." *Crawford*, 37 F.3d at 1341 (holding a genuine issue of material fact precluded summary judgment); *accord Snow*, 128 F.3d at 1205 ("Because discrimination cases often turn on inferences rather than on direct evidence, we are particularly deferential to the nonmovant[,]" citing *Crawford*, 37 F.3d at 1341); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 486 (8th Cir. 1996) (citing *Crawford*, 37 F.3d at 1341); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (quoting *Crawford*, 37 F.3d at 1341); *Johnson*, 931 F.2d at 1244.

Nevertheless, the Eighth Circuit Court of Appeals also has observed that "[a]lthough summary judgment should be used sparingly in the context of employment discrimination cases, *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994), the plaintiff's evidence must go beyond the establishment of a prima facie case to support a reasonable inference regarding the alleged illicit reason for the defendant's action." *Landon v. Northwest Airlines, Inc.*, 72 F.3d 620, 624 (8th Cir. 1995) (citing *Reich v. Hoy Shoe Co.*, 32 F.3d 361, 365 (8th Cir. 1994)); *accord Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1134 (8th Cir. 1999) (burden-shifting framework of *McDonnell Douglas* must be used to determine whether summary judgment is appropriate). More recently, in *Reeves v. Sanderson Plumbing*

Products, Inc., 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), the Supreme Court reiterated that "'[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Reeves*, 530 U.S. at 143, 120 S. Ct. at 2106 (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093, 67 L. Ed. 2d 207 (1981)). Thus, what the plaintiff's evidence must show to avoid summary judgment or judgment as a matter of law is: "1, that the stated reasons were not the real reasons for [the plaintiff's] discharge; and 2, that age [or race, sex, or other prohibited] discrimination was the real reason for [the plaintiff's] discharge." *Id.*, 530 U.S. at 153, 120 S. Ct. at 2112 (quoting the district court's jury instructions as properly stating the law). The Supreme Court clarified in *Reeves* that to meet this burden, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, *may* permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.*, 530 U.S. at 148, 120 S. Ct. at 2109 (emphasis added).

The court will apply the foregoing standards to YSI's motion for summary judgment. As noted above, YSI argues Hasbrouck cannot establish a*prima facie* case of discrimination because he cannot show he is disabled for purposes of the ADA, he is not a qualified individual as defined by the ADA, and even if he were disabled, he failed to avail himself of the reasonable accommodation offered by Forest Ridge, to-wit: the opportunity to apply for other available positions. Hasbrouck argues he either "has or is regarded as having a physical impairment that substantially limits one or more of his major life activities" (Complaint, ¶ 16), and Forest Ridge's decision not to allow him to return to work was based on the misperception that Hasbrouck could not perform the essential functions of the youth counselor position. He also argues Forest Ridge failed to reasonably accommodate his disability.

B. Elements of an ADA claim

This court has described the analytical framework for an ADA disability claim as follows:

> To qualify for relief under the ADA, a plaintiff must establish the following: (1) that he or she is a disabled person within the meaning of the ADA; (2) that he or she is qualified[;] that is, with or without reasonable accommodation (which the plaintiff must describe), he or she is able to perform the essential functions of the job; *and* (3) that the employer terminated the plaintiff, or subjected the employee to an adverse decision, "because of" the plaintiff's disability.

Walsted v. Woodbury County, 113 F.3d 1318, 1326 (N.D. Iowa 2000) (emphasis added); *see Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1016 (8th Cir. 2000). "If a plaintiff in an ADA employment discrimination case can establish these three elements, then the burden shifts to the employer to proffer a legitimate, nondiscriminatory reason for the adverse employment action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); (other citations omitted). Once such a reason is proffered, the burden shifts back to the plaintiff to show that the employer's stated reason is pre-textual." *Walsted*, 113 F.3d at 1326-27.

Under the ADA, a "disabled person" either (1) has a "physical or mental impairment that substantially limits one or more of the [person's] major life activities[,]" (2) has "a record of such an impairment," or (3) is "regarded as having such an impairment." 42 U.S.C. § 12102(2)(A), (B), (C). An employer is prohibited from discriminating against a qualified employee solely on the basis of a disability. 42 U.S.C. § 12112(a). The ADA defines discrimination to include the failure to make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability, unless the accommodation would impose an undue hardship. 42 U.S.C. § 12112(b)(5)(A).

C. Is Hasbrouck a "disabled person" under the ADA?

1. Does Hasbrouck have a qualifying impairment?

In considering whether Hasbrouck has made out a *prima facie* case of discrimination under the ADA, the first inquiry is whether Hasbrouck is "disabled" as defined by the ADA; that is, whether he has a physical or mental impairment that substantially limits one or more of his major life activities. 42 U.S.C. § 12102(2)(A); *see Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481, 119 S. Ct. 2139, 2146, 144 L. Ed. 2d 450 (1999) (requiring that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability). "Merely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity." *Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184, ___, 122 S. Ct. 681, 690, 151 L. Ed. 2d 615 (2002).

The facts relevant to this consideration are undisputed. At the time Hasbrouck was told he could not return to work, he had limitations of no lifting over 40 pounds, and no repetitive bending or twisting. YSI argues these limitations do not meet the criterion of substantially limiting one or more of Hasbrouck's major life activities. Hasbrouck disagrees, arguing he is limited in the major life activity of lifting.

In seeking to further define the term "substantially limits" under the ADA, the Eighth Circuit Court of Appeals looks to the regulations implementing the ADA:

> [T]he EEOC regulations state that the following factors should be considered in determining whether an individual is substantially limited in a major life activity: (i) the nature and severity of the impairment, (ii) its duration or expected duration, and (iii) its actual or expected long-term impact. 29 C.F.R. § 1630.2(j)(2).

Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1319 (8th Cir. 1996) (citations omitted); *see Toyota Motor Mfg., supra.* ADA regulations, as well as ADA interpretive guidance, make clear that temporary, minor injuries do not "substantially limit" a person's

major life activities. 29 C.F.R. § 1630.2(j), 29 C.F.R. pt. 1630, App. § 1630.2(j). In addition, the Supreme Court has held that the determination of whether an individual is substantially limited in a major life activity "is an individualized inquiry" that must take into account mitigating measures such as medicines and assistive devices. *Sutton*, 527 U.S. at 483-84, 119 S. Ct. at 2147.

Because the ADA does not define "major life activities," the Eighth Circuit has been guided by the definition provided in 29 C.F.R. § 1630.2 of the EEOC regulations implementing Title I of the ADA. *See Aucutt*, 85 F.3d at 1319. As the court observed in *Aucutt*:

> As defined in 29 C.F.R. § 1630.2(I), the phrase "major life activities" means "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

*Aucut*t, 85 F.3d at 1319; *Webber v. Strippit, Inc.*, 186 F.3d 907, 910 (8th Cir. 1999). Under the EEOC's interpretations of the ADA,

> "Major life activities" are those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching.

29 C.F.R. pt. 1630, App. § 1630.2(I) (citation omitted). The Eighth Circuit also has considered major life activities to include sitting, standing, lifting, and reaching. *See Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 946 (8th Cir. 1999).

The EEOC's Interpretive Guidance on Title I of the Americans With Disabilities Act, 29 C.F.R. pt. 1630, App. § 1630.2(j), provides:

> [A]n impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as

> compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking.

29 C.F.R. pt. 1630, app., 1630.2(j). *See Walsted, supra*, 113 F. Supp. 2d at 1327-28.

Using these standards, the court must determine whether Hasbrouck has presented a genuine issue of material fact as to whether his lifting restriction substantially limits a major life activity. In *Wheaton*, this court explained when a lifting restriction meets this criterion:

> The Eighth Circuit Court of Appeals recently concluded that "a general lifting restriction imposed by a physician, without more, is insufficient to constitute a disability within the meaning of the ADA." *Snow* [*v. Ridgeview Med. Ctr.*], 128 F.3d [1201,] 1207 [(8th Cir. 1997)]. However, this is not a *per se* rule regarding all lifting restrictions; rather, it is a *per se* [rule] regarding 25 pound lifting restrictions. In *Snow*, the physician imposed a 25 pound lifting restriction. The court held that this lifting restriction, without additional evidence, did not demonstrate that the plaintiff was substantially limited in the major life activity of lifting, and therefore, the lifting restriction was insufficient to constitute a disability within the meaning of the ADA. In reaching its conclusion, the Eighth Circuit Court of Appeals relied on *Aucutt*, which similarly held that a 25 pound lifting restriction, without additional evidence, did not constitute a disability within the meaning of the ADA. *Snow*, 128 F.3d at 1207. Thus, the Eighth Circuit Court of Appeals has clearly indicated that a 25 pound lifting restriction will not, by itself, be sufficient to constitute a disability within the meaning of the ADA. . . .

Wheaton, 66 F. Supp. 2d 1062-63. It is indisputable that if a 25-pound lifting restriction, without more, is insufficient to constitute a disability within the meaning of the ADA, then a 40-pound lifting restriction similarly cannot pass muster for this purpose.

2. Was Hasbrouck regarded by YSI as having a disability?

Although the court has found Hasbrouck has not established a material issue of fact on the question of whether he has an actual disability for ADA purposes, the ADA also protects individuals who are "regarded as having a disability." 42 U.S.C. § 12102(2)(C). The applicable EEOC regulations provide that being "regarded as having such an impairment" means:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(l)(1)-(3). It therefore follows that being "regarded as having a disability" can be demonstrated in any one of three ways: (1) the individual may have some impairment that does not substantially limit him or her in a major life activity, but is perceived by an employer as having a substantially limiting impairment; (2) the individual may have an impairment which, only because of adverse attitudes about the impairment, appears substantially limiting; or (3) the individual may be free from impairments, but regarded by the employer as having a substantially limiting impairment. 29 C.F.R. pt. 1630, App. § 1630.2(l).

The Eighth Circuit Court of Appeals has concluded, "A person is 'regarded as having' an impairment that substantially limits major life activities when others treat that person as having a substantially limiting impairment." *Webb v. Mercy Hospital*, 102 F.3d 958 (8th Cir. 1996); *Wooten, supra,* 58 F.3d at 385 (citing 29 C.F.R. § 1630.2(l)(3)). The *Wooten* court explained that the focus in determining whether a person is regarded as having

a disability is on "the impairment's effect upon the attitudes of others." *Id*. (citing *Byrne v. Board of Educ., Sch. of West Allis*, 979 F.2d 560, 564 (7th Cir. 1992)). Thus, Hasbrouck would be disabled within the meaning of the ADA if YSI regarded him as having a disabling impairment. Stated another way, to prevail on his perceived disability claim, Hasbrouck must establish there is a genuine issue of material fact that YSI perceived his back condition as substantially limiting one or more of his major life activities. *See* 42 U.S.C. § 12102(2)(C); *Aucutt*, 85 F.3d at 1319-20; *Wooten*, 58 F.3d at 385. Hasbrouck must do more than allege that YSI regards him as having an impairment which prevents him from working as a youth counselor; he "must demonstrate that he is regarded as precluded from a broad class of jobs." *Shipley v. City of University City*, 195 F.3d 1020, 1023 (8th Cir. 1999).

On this record, the court finds no evidence that YSI regarded Hasbrouck's lifting limitation as substantially limiting him in a major life activity, nor did YSI regard Hasbrouck as being precluded from a broad class of jobs.

3. Does Hasbrouck have a record of disability?

Although not specifically stated in his *pro se* complaint, Hasbrouck argues in his brief resisting YSI's motion for summary judgment that he "had a record of impairment that substantially limited one or more major life activities and that is what the ultimate adverse decision was based on." (Plaintiff's Brief at 3)[4]

[4]In this section of his brief resisting YSI's motion for summary judgment, Hasbrouck also argues YSI's asserted reason for precluding him from returning to work – that is, to protect Hasbrouck's and others' safety – was a pretext for discrimination. Hasbrouck asks the court to apply the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), raising for the first time the argument that YSI's failure to rehire him was in some way retaliatory. The court finds no evidence in the record to support such a claim, and declines to consider this issue, particularly in light of the fact that Hasbrouck has raised it for the first time in response to YSI's motion. In any event, Hasbrouck has failed to establish a *prima facie* case of discrimination sufficient to trigger the *McDonnell Douglas* burden-shifting analysis.

Having a record of disability means a person "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k); *see Land v. Baptist Medical Center*, 164 F.3d 423, 425 (8th Cir. 1999). This provision is intended to address discrimination that occurs because of an individual's history of a disability or because of an individual's misclassification as disabled. As the EEOC's Interpretive Guidance on Title I of the Americans With Disabilities Act, 29 C.F.R. pt. 1630, App. 1630.2(k), provides in pertinent part:

> The second part of the definition [of 'disability'] provides that an individual with a record of an impairment that substantially limits a major life activity is an individual with a disability. The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. For example, this provision protects former cancer patients from discrimination based on their prior medical history. This provision also ensures that individuals are not discriminated against because they have been misclassified as disabled. For example, individuals misclassified as learning disabled are protected from discrimination on the basis of that erroneous classification. Senate Report at 23; House Labor Report at 52-53; House Judiciary Report at 29.
>
> This part of the definition is satisfied if a record relied on by an employer indicates that the individual has or has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities. There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment records.

29 C.F.R. pt. 1630, app., 1630.2(k).

Hasbrouck has failed to show that he has, or that YSI relied upon, a record of having an impairment that substantially limits one or more of his major life activities. As such, the court concludes Hasbrouck has failed to present a genuine issue of material fact as to

whether he has a history of, or has been misclassified as having, an impairment that substantially limits one of his major life activities.

III. CONCLUSION

Considering the record in the light most favorable to Hasbrouck, the court finds as a matter of law that he has failed to establish he is a disabled person within the meaning of the ADA, and therefore, he cannot prove a *prima facie* case of discrimination under the ADA. The court therefore **grants YSI's Motion for Summary Judgment, and directs entry of judgment in favor of YSI and against Hasbrouck**.

IT IS SO ORDERED.

DATED this 19th day of August, 2002.

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MARK W. BENNETT
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA